(12)

PETITION AND BRIEF

Supreme Court of the United States

OCTOBER TERM, 1942

No. 978

HOWARD NATIONAL BANK AND TRUST COMPANY,
PETITIONER

vs.

EMILY TENNEY MORGAN, MARIAN BAYLEY BUCHANAN, RICHARD MORGAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

FILED , 194 .

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SUPREME COURT OF THE UNITED STATES

October Term, 1942

No.

IN THE MATTER OF THE ESTATE OF HARRIS R. WATKINS, *Deceased*,

HOWARD NATIONAL BANK AND TRUST COMPANY, *Petitioner*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Howard National Bank and Trust Company of Burlington, Vermont, a corporation created and existing under the laws of the United States and having its principal office at Burlington in the State of Vermont, brings this its petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Vermont entered in the above entitled cause, affirming the judgment of the Probate Court of the State of Vermont for the District of Chittenden and remanding the cause to said Probate Court.

The opinion, review of which is sought has not been printed in the official reports of the Supreme Court of Vermont but is printed in 30 Atlantic (2d) 305.

SUMMARY STATEMENT OF MATTER INVOLVED

This cause arose upon the petition of the beneficiaries of a testamentary trust provided by the will of Harris R. Watkins, late of Burlington, in said Probate District of Chittenden in the State of Vermont, for the appointment of an administrator d. b. n. c. t. a. The will was duly probated March 18, 1930, and letters testamentary were issued to City Trust Company (*Op. par. 6-7, Rec. 51-52*), then a banking corporation created and existing under the laws of the State of Vermont, with its principal office in Burlington, Vermont, which was named executor in said will and had qualified April 17, 1930. (F. 10, Rec. 26.) City Trust Company occupied the same banking rooms and had the same officers as Howard National Bank (F. 12, Rec. 26; *Op. par. 9, Rec. 52*), and on the 12th day of March, 1931, while acting as executor as aforesaid, was consolidated with said Howard National Bank by virtue of the Act of Congress of November 7, 1918, as amended February 25, 1927, c. 191, sec. 1. (F. 15, Rec. 27, *Op. par. 9, Rec. 52-53.*) The consolidated corporation took the name Howard National Bank and Trust Company. The consolidation was approved and certified by the Comptroller of the Currency, March 12, 1931. (*Ib.*) No annual corporation license tax for City Trust Company was paid to the state of Vermont for the succeeding year. And on April 1, of that year (1932) a revocation of the state charter of City Trust Company for non-payment of the annual license tax was recorded by the Secretary of State. (F. 4, Rec. 24-25, *Op. par. 9, Rec. 52-53.*) The petition by which this proceeding was instituted, alleged the provision of the will, that the petitioners were the persons in interest, that the will was allowed and City Trust Company qualified as executor, that the debts, the funeral expenses and special legacies had been satisfied, that the consolidation and charter revocation above stated had occurred, that the consolidated national bank had never been appointed executor or administrator and had taken over the assets of the estate without right, "that there is not now, there never has been since on or about March 12, 1931 (the date of consolidation) any legal

executor or administrator. . . ." Wherefore petitioners pray for the appointment of an administrator (Rec. 4-7). A copy of the will was annexed. (Rec. 8-9.)

Howard National Bank and Trust Company made answer asserting among other things the following:

> "(a) On the 12th day of March, 1931, City Trust Company a Vermont corporation theretofore named, qualified and acting as executor of the will of Harris R. Watkins was consolidated with Howard National Bank, a corporate instrumentality of the United States, into a corporation of the United States under the name and style of Howard National Bank and Trust Company of Burlington having the same officers and directors as City Trust Company and by virtue of the laws of the United States, then and since in harmony with the laws of the State of Vermont in this regard, the powers, property, rights, obligations and duties of fiduciary relationship of City Trust Company, including the executorship of said will of Harris R. Watkins, devolved upon said consolidated corporation, and from said day hitherto have been exercised by it agreeably to the laws of the United States of which said consolidated corporation became and continued a corporate instrumentality and agreeably to the laws of Vermont.
> "(b) Since March 12, 1931, City Trust Company has continued its existence as a constituent part of Howard National Bank and Trust Company continued in life by and subject to the laws of the United States of America and said City Trust Company as a constituent part of said Howard National Bank and Trust Company has continued to be and is an instrumentality of the United States; and the state of Vermont since said March 12, 1931, hitherto has been without power to regulate, control or terminate the corporate existence of said City Trust Company as a constituent part of said consolidated corporation or to impair its utility."

And that from the date of consolidation the consolidated bank "has been the true and qualified executor acting under bond as provided by law." (Rec. 13-14.)

After finding the facts the Probate Court entered a judgment order that:

> "City Trust Company upon the forfeiture of its charter, ceased to exist as a corporate entity of the State of Vermont, for the purposes of this case.
> "It is further, adjudged that a vacancy was created in the office of the Executor of the Estate of Harris R. Watkins as of that time." (Rec. 2.)

This judgment, thus fixing the termination of the executorship upon the date of the supposed forfeiture of the charter of City Trust Company rather than at the time of consolidation, as asserted by the petitioners, was affirmed by the Supreme Court of Vermont. That court recognized the claim of the consolidated national bank made in its answer as above stated and, pursuant to claims made in the brief for the consolidated bank, *held:*

(1) ". . . . in the absence of any statutory interdict we are unable to discern a public policy of this State, that would operate to prevent a consolidation of State and National banks under the Acts of Congress. Specific statutory authorization was not necessary. *Casey* v. *Galli,* 94 U. S. 673, 24 L. ed. 168, 169; *Petition of Worcester County Nat. Bank, supra,* 162 N. E. at page 220. We hold that the consolidation of the City Trust Company and the Howard National Bank was not in contravention of our law, or of our public policy." (*Op. par. 12, Rec. 54.*)

(2) That there was no Vermont statute which declared the charter void upon consolidation (*Op. par. 14, Rec. 55*) and it followed precedents which it cited to the effect that:

> ". . . . the corporate identity of the trust company is not destroyed and its charter is not dissolved by the consolidation." (*Op. par. 14, Rec. 55.*)

(3) That the appointment of an executor is not in Vermont the result of judicial proceedings but:

> "In our law an executor is a person, or corporation empowered to discharge the duties of a fiduciary, appointed as such by the testator in his will. The Probate Court has no power of choice, for the office is held by virtue of the testator's selection." (*Op. par. 16, Rec. 56.*)

But the Vermont court contrary to the claim of the consolidated bank held that the petitionee did not become the legal executor as the result of the consolidation, asserting:

> "Our law does not recognize any right to succession to the office of an executor by a person or corporation not designated by the testator in his will." (*Op. par. 17, Rec. 57.*)

(4) The court then ruled that the state might after the consolidation regulate, tax and destroy the state corporation and thereby extinguish its authority as executor and create a vacancy to be filled by the probate court. The court said:

> "As we have seen, the petitionee asserts that since the date of the consolidation the State of Vermont has been without power to regulate, control or terminate its corporate existence. We do not adopt this view. The 'franchise' of the state bank, the transfer of which is provided for in the Act of Congress (12 U. S. C. A. Sec. 34a), cannot mean its right to be a corporation. The right to transfer franchise powers of a corporation organized under the laws of one sovereignty to a corporation organized under the laws of a different sovereignty is extraordinary. It can not be implied in the absence of explicit statutory enactment to that end." (*Op. par. 19, Rec. 57.*)

In support of this proposition the court cited Massachusetts and Pennsylvania cases and failed to accept or apply the rule of immunity of national banks from state control, as enunciated by this court in *Davis* v. *Elmira Savings Bank*, 161 U. S. 275 at 283, cited and quoted in the brief for the consolidated bank and the rule recognized by the Vermont court in *State* v. *Clement National Bank*, 84 Vt. 167 (cited and quoted in the brief for the consolidated bank), that there can be no state taxation of a national bank

without the consent of Congress, citing *Mercantile, etc., Bank* v. *City of New York*, 121 U. S. 138, *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664 and other cases.

The Vermont Supreme Court impliedly held that, after the consolidation, City Trust Company was taxable under Section 1035 of the General Laws of Vermont which is as follows:

> "Every foreign corporation doing business in this state, and every association or joint stock company doing business in this state issuing shares of stock or dividing its corporate rights or property into shares, and every domestic corporation, shall, except as hereinafter provided, pay an annual license tax to the state."

The court after holding that the corporate franchise was not transferred by consolidation, continued:

> "It follows that the State of Vermont had the power to terminate the corporate existence of the City Trust Company, in accordance with G. L. 1046 (now P. L. 1000), providing that: 'Every corporation shall, by virtue of this section, except as otherwise provided, cease to exist as such corporation on the first day of April in any year during which such corporation has not, on or before such day, filed its annual license tax returns for the fiscal year beginning with the first day of the preceding Febuary, and has not, on or before the first day of April in such year, paid to the state the annual license tax for such fiscal year. . . .' Although the certificate of revocation was dated June 1, 1932, the City Trust Company, not having paid its annual license tax, ceased to exist as a corporation upon April 1, of that year. Its authority as executor was thereupon extinguished and it devolved upon the Probate Court to grant administration to a suitable person, as required by G. L. 3240, now P. L. 2784, which is, undobtedly, the exercise of a judicial function." (*Op. par. 20, Rec. 58.*)

The court further said:

> "The court might, after the dissolution of the City Trust Company's charter, have appointed the petitionee administrator with the will annexed, for a national bank may serve in this capacity." (*Op. par. 24, Rec. 60.*)

The court further recognized that prior to consolidation the constituent banks, City Trust Company and Howard National Bank, occupied the same banking rooms and had the same officers (*Op. par. 9, Rec. 52*); and that at the time of consolidation the consolidated bank took possession and control of the assets of the estate and thereafter

> ". . . . the directors of the City Trust Company never took action as a board and the affairs previously conducted by the company were directed and controlled by the directors and officers of the petitionee." (*Op. par. 10, Rec. 53.*)

Thus the Supreme Court of Vermont held that although the federal statute with respect to consolidation of state and national banks could operate in Vermont because not in contravention of Vermont law, it could not operate upon the franchise to be a corporation because the state had not given affirmative consent; and it could not operate upon the testator's designation of an executor because the consolidated corporation was not the same corporation named by the testator. That the state corporation continued in life and continued to hold the executorship, although it was under the management and all its assets, including the estate assets, were in the custody of the consolidated bank. But that the state corporation, after consolidation, remained subject to the control and taxation of the state and that for failure to pay a corporation license tax assessed by the state of Vermont, the state could destroy that corporate entity and vacate the executorship.

ASSERTED BASIS OF JURISDICTION TO REVIEW

Petitioner contends that the Supreme Court of the United States should review the judgment of the Supreme Court of the State of Vermont because the Supreme Court of the State of Vermont has decided federal questions of substance,

(a) Which heretofore had not been expressly determined by this Court; ***and***

(b) Has decided such substantial federal questions in a way probably not in accord with the applicable decisions of this Court with respect to the controlling elements of the questions here presented.

The questions are federal because the ruling of the State Court frustrates the full accomplishment of the expressed purposes of the national legislation as to consolidation of state banks into national banks, when not in contravention of state law.

In particular the questions involve the decision of a state court which:

(1) Makes the full operation of the federal statute as to the consolidation of state and national bank depend upon the expressed consent of the state rather than upon the absence of contravening law.

(2) Sanctions taxation burdening a national bank (through a constituent state bank) in a manner not within the permission of Congress.

(3) Without the consent of Congress, imposes upon the constituent state bank, after consolidation, control by the state to the extent of destruction of that constituent to the detriment of the consolidated national bank.

The questions are substantial because (1) they are the necessary foundation of a decision which deprives petitioner of the right to act as executor and makes it an intermeddler in a large estate; and (2) because the answers given by the Vermont court to those questions, assert as the necessary basis of the decision, a rule so important and far reaching that it would subject many national banks throughout the United States to the payment of unlawful and burdensome tax levies by the states, or alternatively to impairment of their operations.

The sum of the answers to these federal questions raises an issue of federal law which has never been presented to this court for a composite ruling. But the component rules which make up

the decision of the state court are in conflict with the decisions of this court, *viz.*:

(1) The ruling that affirmative consent of the state is necessary to a complete consolidation of a state bank into a national bank, though there be no contravening state law, is in conflict with the decision of this Court in *Ex parte Worcester County National Bank*, 279 U. S. 347 and with other cases cited in the accompanying brief.

(2) The ruling that a state may burden a consolidated national bank by a license tax upon the constituent state bank is in conflict with

Owensboro National Bank v. *Owensboro*, 173 U. S. 664, 19 S. Ct. 537, 43 L. ed. 850.

Colorado National Bank of Denver v. *Bedford*, 310 U. S. 41 at 52, 60 S. Ct. 800 at 805, 84 L. ed. 1067.

Davis v. *Elmira Savings Bank*, 161 U. S. 275, 16 S. Ct. 502, 40 L. ed . 700, as well as other cases cited in the accompanying brief.

(3) The rule that after consolidation into a national bank under federal law not in contravention of state law, the state retains a degree of control of a constituent state bank such that it may destroy the state corporate entity and thereby terminate an executorship held by the state bank after consolidation to the benefit and under the management of the consolidated bank, is in conflict with *Davis* v. *Elmira Savings Bank, supra*, and other cases cited in the brief, and

(4) The ruling that a consolidated national bank may not hold in its own name an executorship held by a constituent bank at the time of consolidation, although the state bank's entity is not destroyed by consolidation, because the consolidated bank is not the bank name as executor in the will, which (rather than judicial appointment) creates the executorship,—this ruling is in conflict with the implied ruling of this Court in *Ex parte Worcester County National Bank, supra*, although the question has not been expressly decided by this court.

QUESTIONS PRESENTED

Petitioner asserts that upon the record the decision of the State Supreme Court raises questions which this petition presents for review as follows:

1. If a state has no law or public policy in contravention of consolidation of state banks into national banks under the federal statutes (Act of November 7, 1918, c. 209, sec. 3, as amended by Act of February 5, 1927, c. 191, sec. 1),

2. And if a bank of its creation, while holding under its law the office of executor by virtue of testamentary appointment rather than judicial order, has been lawfully consolidated into a national bank without loss of corporate existence or of its office as executor.

In those circumstances, may the state, after consolidation, deny the right of the consolidated bank to be executor for the reason that it was not named in the will and impose a corporate license tax upon the constituent state corporation and, if the tax is not paid, destroy the constituent state corporation and terminate its executorship because the laws of the state did not give affirmative consent to the merger of the state corporate identity into the national corporation? *This question is divisible, thus:*

In the circumstances above stated

(a) May the state deny the effectiveness of the federal statute to transfer out of state control and vest in the consolidated bank the franchise of the state bank to be a corporation, unless the state gives affirmative consent to such a transfer?

(b) May the state refuse to recognize the consolidated bank as the legal executor in the right of the continuing state entity?

(c) May the state continue to regulate and control the constituent state bank?

(d) May the state after the consolidation continue to impose license taxes with respect to the constituent state bank in a form not within the permission of Congress as to taxation of national banks?

(e) May the state destroy the constituent state entity because those taxes are not paid, and thereby terminate the executorship to the injury of the consolidated national bank?

Petitioner asserts that these questions require answers in the negative; and when so answered require the reversal of the decision of the state courts.

REASONS RELIED ON

The reasons upon which petitioner relies are set forth in an accompanying brief. The decision of the Vermont Supreme Court asserts that that State may regulate, control, tax and destroy the corporate existence of a constituent state bank after completion of its consolidation with a national banking association under the Act of Congress, although that control, taxation and destruction operates to the detriment of the national bank. But this decision of the State Supreme Court is in conflict with established law of this court that state law may not operate in conflict with the laws of the United States as to national banks. It impairs the efficiency of national banks to exercise the powers and discharge the duties conferred and imposed by the laws of the United States, (*Davis* v. *Elmira Savings Bank*, 161 U. S. 275, *McClellan* v. *Chipman*, 164 U. S. 347; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664; *First National Bank of Gulfport* v. *Adams*, 258 U. S. 362, and other cases cited in the accompanying brief.) The rule is applicable whether the taxation or interference is direct or indirect, (*Osborn* v. *Bank of the United States*, 9 Wheaton 738; *Federal Land Bank* v. *Crossland*, 261 U. S. 374, 43 S. Ct. 385, 67 L. ed. 703; *Pittman* v. *H. O. L. C.*, 308 U. S. 21, 60 S. Ct. 15, 84 L. ed. 11; *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 48 S. Ct. 451, 72 L. ed. 857.)

The Supreme Court of the State of Vermont asserted that that State might exercise the regulation, control, taxation and destruction of the constituent state bank after consolidation because, al-

though there was no law or public policy of Vermont in contravention of consolidation, the State of Vermont had not given affirmative statutory consent to the transfer of the corporate franchise of the constituent state bank. But such affirmative consent is not required by the statute to an effective consolidation, by which the consolidated national bank shall acquire all the franchises, interests and fiduciary offices of the constituent state bank, unless there are contravening state laws; and the operation of the statute according to its terms is within the federal power (*Ex parte Worcester County National Bank*, 279 U. S. 347; *Cannon* v. *Dixon* (C. C. A. 4, 1940), 115 F. (2d) 913; and see *Metropolitan National Bank* v. *Claggett*, 141 U. S. 520; *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 12 S. Ct. 450, 36 L. ed. 162; *Guardian Depositors' Crop.* v. *Currie* (1940), 292 Mich. 549, 297 N. W. 2; *Central United National Bank* v. *Abbott* (1939), 135 Ohio St. 37, 18 N. E. (2d) 981 and other cases cited in the brief.)

The denial by the state court of effective operation of the statute, so as to preserve the complete identity of the constituent state bank within the corporate structure of the consolidated national bank, resulted in the denial to the consolidated natoinal bank of the right of executorship given it by the federal statute (*Adams* v. *Atlantic National Bank* (1934), 115 Fla. 399, 155 S. 648), although the state treated the executorship of the state bank as continuing.

The rules of law thus asserted by the Vermont state court may be applied to the injury of a great number of consolidated national banks throughout the United States because they are based upon general theories of federal power and federal statutes and are not limited to the peculiar statutory provisions of a particular state.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of, and under the seal of, this Honorable Court directed to the Supreme Court of the State of Vermont commanding that Court to certify and to send to this Court for its review and determination a transcript of the record and proceedings in the aforesaid cause and that the judgment of said Supreme Court of said State of Vermont affirming the judgment of the Probate Court for the District of Chittenden in the State of Vermont be reversed by this Honorable Court; and that if need be to effectuate a proper presentation of the record in the aforesaid cause a writ of certiorari be issued out of and under the seal of this Honorable Court directed to said Probate Court for the District of Chittenden in the State of Vermont, commanding that Court to certify and send to this Court for its review and determination all or so much as may be appropriate of the record in the above entitled cause; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

JOSEPH T. STEARNS,
G. J. MURPHY,
Both 172 College Street,
Burlington, Vt.
Of Counsel.

GUY M. PAGE,
172 College Street,
Burlington, Vt.
JOHN J. DESCHENES,
158 Bank Street,
Burlington, Vt.
Attorneys for Petitioner.

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